FILE COPY

FILED
FEB 23 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 589

NORTHERN ILLINOIS COAL CORPORATION,
*Petitioner,*

*vs.*

MIDWEST-RADIANT CORPORATION,
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

DAVID F. ROOT,
LEONARD HOFFMAN,
*Attorneys for Petitioner.*

THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

## INDEX.


| | PAGE |
|---|---|
| Petition | 1 |
| Jurisdiction | 2 |
| Opinion Below | 2 |
| Summary Statement of the Matter Involved | 2 |
| Questions Presented | 5 |
| Reasons for Granting the Writ | 5 |
| Prayer | 7 |
| Brief | 9 |
| Statement of the Case | 9 |
| Jurisdiction | 9 |
| Opinion Below | 10 |
| Specification of Errors | 10 |
| Argument | 11 |
| Conclusion | 23 |


### CITATIONS.

*Cases.*


| | |
|---|---|
| Barber v. Pittsburgh Etc. Railway, 166 U. S. 83, 97, 99. | 19 |
| Big Creek Coal Co. v. Tanner, 303 Ill. 297 | 16 |
| Chicago v. Fieldcrest Dairies, 316 U. S. 168, 172, 173 | 22 |
| Conover v. Parker, 226 Ill. App. 102 | 16 |
| Duffield v. Duffield, 293 Ill. 300, 303 | 17 |
| Erie Railroad Company v. Tompkins, 304 U. S. 64, 78 | 6, 19, 20 |
| Guffey v. Smith, 237 U. S. 101, 113 | 19 |
| Harder v. Matthews, 309 Ill. 548, 570 | 17 |
| Jilek v. Chicago, Wilmington & Franklin Coal Co., 382 Ill. 241 | 15 |

Kozlowski v. Mussay, 395 Ill. 81, 85, 86..... 17
Manning v. Frazier, 96 Ill. 279, 284, 286.....6, 11, 15, 16
McConnell v. Pierce, 210 Ill. 627..... 16
Olcott v. Bynum, 84 U. S. 44..... 19
Perry Coal Co. v. Richmond, 287 Ill. App. 298..... 16
Plummer v. Worthington, 321 Ill. 450, 452, 455.....5, 12
Powell v. Powell, 335 Ill. 533, 538..... 17
Railroad Commission of Texas v. Pullman Company, 312 U. S. 496, 500..... 22
Rockford Trust Co. v. Moon, 370 Ill. 250, 253..... 17
Sanitary District v. Chicago Title & Trust Company, 278 Ill. 529, 532, 533, 537.....5, 13
Shell Oil Co., Inc. v. Moore. 382 Ill. 556..... 16
Sherman v. Town of Jefferson, 274 Ill. 294, 296.....5, 12
Snydam v. Williamson, 65 U. S. 427..... 19
Storke v. Penn. Mutual Life Insurance Company, 390 Ill. 619.....5, 14
Thompson v. Magnolia Petroleum Company, 309 U. S. 478, 483, 484.....6, 22
Tyler v. United States, 281 U. S. 497, 501..... 20
Uphoff v. Trustees of Tufts College, 351 Ill. 146..... 15
Woods v. Seymour, 350 Ill. 493, 497, 498..... 17

*Statutes and Miscellaneous.*

Section 1254, Title 28, United States Code..... 2
Section 274d(1), Judicial Code, 28 USCA Section 400(1)..... 2
54 Harvard Law Review 1379..... 23

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

---

**No.** .....

---

NORTHERN ILLINOIS COAL CORPORATION,

*Petitioner,*

*vs.*

MIDWEST-RADIANT CORPORATION,

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI.

---

*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioner, Northern Illinois Coal Corporation, respectfully prays that a writ of certiorari may issue to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment of that court reversing a judgment of the district court finding that petitioner was the owner of coal and salt underlying certain real estate in St. Clair County, Illinois.

## JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

The judgment of the circuit court of appeals was entered on November 30, 1948 (T. 383).

## OPINION BELOW.

The opinion of the circuit court of appeals appears in the transcript of the record at page 374. It has not yet been reported. The district court opinion appears in the transcript of the record at page 306. It has not been reported.

## SUMMARY STATEMENT OF THE MATTER INVOLVED.

This suit involves the question of title to minerals underlying land in St. Clair County, Illinois. Respondent brought the suit under the Declaratory Judgment Act (Sec. 274d(1) of the Judicial Code, 28 U. S. C. A. Sec. 400(1)) invoking federal jurisdiction under the diversity statute.

The facts are quite simple: In 1902 one Augusta Keim owned the land in controversy. In that year she executed and delivered to one D. D. Thomas the deed found at page 153 of the transcript, by which she conveyed upon the terms and conditions therein contained the coal and salt underlying said land. In 1944 D. D. Thomas conveyed his right, title and interest in and to said coal and salt to petitioner (T. 155). In 1909 Augusta Keim executed and

delivered to one Ernest W. Hentze a deed purporting to convey to him the entire fee in said land (the coal and salt not being excepted) (T. 133). In 1944 Hentze's son and successor in title entered into a lease agreement with respondent for the mining and removal of said coal (T. 146).

The deed from Augusta Keim to D. D. Thomas contained the following provision:

> "Grantee to commence sinking a mine at Lenzburg in six months from this date and have same in operation in one year from that date or this deed is to be void."

At the trial it was established by stipulation (T. 301) and plaintiff's exhibit No. 10 (T. 160) that D. D. Thomas in 1902 sunk a coal shaft at Lenzburg but no coal was found and consequently none produced, and that D. D. Thomas expended approximately $3,000.00 of his own funds in the sinking of said shaft; insofar as the matter in dispute between petitioner and respondent is concerned, *no other evidence was offered or admitted at the trial.*

The only question in the case between petitioner and respondent concerns the legal effect of the deed from Augusta Keim to D. D. Thomas.

The district court in its written opinion (T. 306) construed the Keim-Thomas deed to be a conveyance of the coal and salt upon condition subsequent (T. 309), and held that although there had been a breach of the conditions stated, a re-entry by Augusta Keim or her heirs was necessary to revest title to the coal and salt in her or her heirs (T. 310), that there had been no re-entry, and that therefore title in and to the coal and salt remained vested in petitioner as Thomas' grantee (T. 311).

The circuit court of appeals in reversing the district court construed the Keim-Thomas instrument to be a conveyance of an estate upon a condition precedent and held

that Thomas' estate was terminated by abandonment, and therefore petitioner, as Thomas' grantee, had no right, title or interest in and to said coal and salt (T. 381).

This case involves only the title to Illinois real estate. No constitutional or other federal question is involved. Were it not for the accident of federal jurisdiction, based solely upon diversity, the case would have been determined by the courts of Illinois. By its decision that the conveyance from Keim to Thomas created an estate upon condition precedent, the circuit court of appeals has completely ignored decisions of the Supreme Court of Illinois directly on point. This decision, if permitted to stand, has created in Illinois a separate rule for the construction of deeds creating conditional estates in land. By abrogating the Illinois rule in the federal courts the circuit court of appeals has established a rule of construction which in the future will result in the adjustment of rights solely upon the happy or unhappy chance of adjudication before a federal or a state court. Consequently, in the future an owner of a conditional estate in Illinois realty, by not knowing who his adversary might ultimately be, and whether or not his rights will be adjudged in a federal or a state court, will not know his rights in relation to such land.

The circuit court of appeals found that "the precise question * * * has never been passed upon by the Illinois courts" (T. 378). We disagree. However, if this were true, the court should have remitted the question to the district court for submission to the state courts of Illinois for decision, for they plainly constitute the more appropriate forum, and upon subsequent decision by the Supreme Court of Illinois it may appear that the rights in local property of the parties to this proceeding have, by the accident of federal jurisdiction, been determined contrary to the law of Illinois which in this matter is supreme.

## QUESTIONS PRESENTED.

1. Does an instrument in the form and language of the deed from Augusta Keim to D. D. Thomas, under the law of Illinois, create in the grantee an estate upon condition subsequent or an estate upon condition precedent?

2. In the event that the legal effect of an instrument affecting title to real estate has not been passed upon by the courts of the particular state, should a federal court, when no constitutional or other federal question is involved and its jurisdiction rests solely upon diversity, undertake to decide an important question of local law, or should the parties be remitted to the state courts as the more appropriate forum?

## REASONS FOR GRANTING THE WRIT.

The discretionary power of this Court to grant a writ of certiorari is invoked upon the following grounds:

1. The decision of the circuit court of appeals that the Keim-Thomas instrument created an estate upon condition precedent is in direct conflict with the decisions of the Supreme Court of Illinois in *Plummer* v. *Worthington*, 321 Ill. 450; *Sherman* v. *Town of Jefferson*, 274 Ill. 294; *Sanitary District* v. *Chicago Title and Trust Company*, 278 Ill. 529, and *Storke* v. *Penn. Mutual Life Insurance Company*, 390 Ill. 619.

2. The decision of the circuit court of appeals was based upon the court's supposition as to the intention of the parties to the Keim-Thomas instrument and their practical construction thereof. In arriving at this decision the court

departed so far from the accepted course of judicial proceedings as to call for the exercise of this Court's power of supervision.

a. This decision is based upon conclusions of the court which were arrived at solely by wild assumption, imagination, speculation and conjecture, *wholly unsupported by any evidence offered or appearing in the record.*

b. This decision completely ignores and is in direct conflict with the decision of the Supreme Court of Illinois in *Manning* v. *Frazier*, 96 Ill. 279.

3. The circuit court of appeals has enunciated important rules of local real estate law directly opposed to the rules established by the courts of Illinois, the direct result of which will be that property rights will vary according to whether enforcement is sought in the state or federal courts. Thus the non-citizen has the privilege of selecting the court in which the right should be determined, thereby rendering impossible equal protection of the law and uniformity in its administration in the State of Illinois. Consequently, this decision creates in Illinois a situation condemned by this Court in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, and later cases.

4. The circuit court of appeals was faced with the interpretation of an instrument of conveyance in accordance with Illinois law. If the court was correct in its statement that "the precise question has never been passed upon by the Illinois courts," the parties should have been remitted to the district court for submission of the question to the courts of Illinois as the more appropriate forum for decision in accordance with the decision of this Court in *Thompson* v. *Magnolia Petroleum Company*, 309 U. S. 478, especially in view of the fact that no constitutional or other federal question was involved and federal jurisdiction was invoked only through diversity.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

DAVID F. ROOT,
LEONARD HOFFMAN,
*Attorneys for Petitioner.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

---

**No.** .....

---

NORTHERN ILLINOIS COAL CORPORATION,
*Petitioner,*

*vs.*

MIDWEST-RADIANT CORPORATION,
*Respondent.*

---

## BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

---

### STATEMENT OF THE CASE.

---

The essential facts of the case are stated in the accompanying petition for a writ of certiorari.

### JURISDICTION.

---

The jurisdiction of this Court is shown in the accompanying petition.

## OPINION BELOW.

The opinion of the circuit court of appeals is found at page 374 of the transcript.

## SPECIFICATION OF ERRORS.

If a writ of certiorari is issued, petitioners intend to urge that the Circuit Court of Appeals for the Seventh Circuit erred:

1. In deciding that the instrument from Augusta Keim to D. D. Thomas created an estate on condition precedent and that that estate was terminated by abandonment.

2. In failing to remit the parties to the district court for submission of the question to the courts of Illinois as the more appropriate forum for decision after finding that the precise question had never been passed upon by the Illinois courts.

## ARGUMENT.

### I.

**The Circuit Court of Appeals Has Decided an Important Question of Local Law In Direct Conflict With the Decisions of the Supreme Court of Illinois.**

The heart of the controversy in the present case is the construction of the conveyance from Augusta Keim to D. D. Thomas. This deed is a typical mining conveyance under the Illinois law (*Manning* v. *Frazier*, 96 Ill. 279). It contains a clause for the protection of the grantor in case the grantee does not commence mining operations. Such a protective clause is habitually inserted in mineral conveyances in Illinois. The clause in the Keim-Thomas deed reads as follows:

> "Grantee to commence sinking a mine at Lenzburg in six months from this date and have same in operation in one year from that date or this deed is to be *void*." (Italics supplied.)

This type of protective clause has been consistently held by the Illinois courts to create an estate upon condition subsequent, as found by the district court, and it operates to protect the grantor, upon grantee's failure to comply with the conditions stated, by giving the grantor the right to re-enter the estate conveyed and thereby revest title thereto in himself. In this case Augusta Keim could have done just that, had she so chosen. Her failure to re-enter was a matter of record at the time respondent entered into its lease agreement with Hentze, and was specified as a defect in Hentze's title by respondent's attorneys as follows (T. 17):

> "This is to advise that, under the terms of Lease Agreement entered into between you and Midwest-Radiant Corporation, dated October 5, 1944, Midwest-Radiant Corporation has examined title to the real estate described in said Lease Agreement and has found that your title in and to said real estate is defective in the following respects:
>
> (1) There appears on record a *deed* to D. D. Thomas in and to the coal and salt lying under the surface of the premises described, dated March 20, 1902, and recorded April 17, 1902, in Book 294, at page 153." (Italics supplied.)

The decision of the circuit court of appeals is in direct conflict with the decision of the Supreme Court of Illinois in *Sherman* v. *Town of Jefferson*, 274 Ill. 294. The deed construed in that case contained the following protective clause:

> "This conveyance is made, * * * and upon ceasing to be so used and enjoyed by the said party of the second part, in whole or any part thereof, the conveyance above becomes and remains *absolutely void* and of no longer force, effect or obligation as against the said party of the first part, his heirs and assigns." (Italics supplied.)

The Supreme Court of Illinois stated (p. 296):

> "It is undeniable that the conveyance from John Gray to the town of Jefferson 'for town purposes only', and upon ceasing to be so used the conveyance to become *void* as against the grantor and his heirs, *was a valid condition subsequent.*" (Italics supplied.)

The decision of the circuit court is also in direct conflict with the decision of the Supreme Court of Illinois in *Plummer* v. *Worthington*, 321 Ill. 450. Following the description in the deed in that case appeared the following protective clause (p. 452):

> "Provided, nevertheless, that the said party of the second part shall pay, or cause to be paid, to the parties

of the first part the sum of $40 per annum during their natural lives. Now, if the above sum of $40 is not paid annually by the party of the second part, then everything herein contained shall be *null and void.*" (Italics supplied.)

The Supreme Court of Illinois stated (p. 455):

> "*The condition for the annual payment of $40 in each deed was clearly a condition subsequent.* Whether or not it was also a covenant it is unnecessary to determine. The stipulation that upon failure to make an annual payment everything contained in the deed should be *null and void was equivalent to an express stipulation for the forfeiture of the estate and a right of re-entry by the grantor.*" (Italics supplied.)

The decision of the circuit court is also in direct conflict with the Supreme Court of Illinois in *Sanitary District* v. *Chicago Title and Trust Company,* 278 Ill. 529. The deed construed in that case contained a protective clause as follows (p. 532):

> "That the district shall construct, excavate and complete said proposed new channel of the dimensions specified in section 2 and shall cause the waters of the Chicago river to permanently pass through the same within three years from the date of the deed, and shall construct said channel of the dimensions mentioned in section 2 through the above property within two years from and after the date of the deed."

Other conditions were also stated and then the deed contained this paragraph (p. 533):

> "This deed is made on the express condition that the party of the second part, or its successors, shall faithfully perform each and all of the conditions herein contained on its part to be performed, and any neglect or failure so to do shall forfeit the estate hereby conveyed, and in such case *this conveyance shall be null and void* and the estate hereby conveyed shall revert to and immediately vest in the party of the first part, its successors and assigns." (Italics supplied.)

The Supreme Court of Illinois stated (p. 537):

> "That instrument is a deed poll conveying the land described solely for the purpose of the proposed new channel *upon conditions subsequent.* The effect of it was to vest the title in the appellant until condition broken, as completely as if the conveyance had been absolute. *The appellee retained no estate in the land and had no more than a possibility of reverter,*—the bare right of entry in case of the breach of a condition." (Italics supplied.)

The only word of condition in the Keim-Thomas deed is the word *"void"*. The above three cases are clear and irrefutable decisions of the Supreme Court of Illinois on the legal effect of the use of that word in Illinois deeds. When the word *"void"* is used as a word of limitation in Illinois conveyances of conditional estates it cannot effect the creation of anything but an estate upon condition subsequent.

A full discussion of the law of Illinois with reference to the distinction between estates upon condition subsequent and estates upon condition precedent is set forth in the recent case of *Storke* v. *Penn. Mutual Life Ins. Co.*, 390 Ill. 619, decided by the Supreme Court of Illinois in 1945.

In its opinion the circuit court repeatedly refers to the protective clause in the Keim-Thomas deed as the "abandonment clause", assumes that the clause was inserted for the benefit of Thomas, ignores the Illinois law, and on the basis of cases from other jurisdictions concludes that the Keim-Thomas deed created an estate upon condition precedent. The denomination by the circuit court of this clause as an "abandonment clause" is an interjection into the real property law of Illinois of a most absurd fiction. The clause is not a clause of abandonment for the benefit of the grantee, but rather a protective clause for the benefit of the grantor. Though the Supreme Court of Illi-

nois has repeatedly construed clauses in deeds similar to the one here under consideration, it has *never* indicated that such a clause was an "abandonment clause". On the contrary it has been consistently held by the Illinois courts that a fee, once created, cannot be abandoned (*Uphoff* v. *Trustees of Tufts College*, 351 Ill. 146 and *Jilek* v. *Chicago, Wilmington and Franklin Coal Co.*, 382 Ill. 241). *In Illinois there is no such thing as an "abandonment clause" in the law of deeds. In Illinois a fee, once created, cannot be abandoned.*

The decision of the circuit court is in direct conflict with the decision of the Supreme Court of Illinois in *Manning* v. *Frazier*, 96 Ill. 279, wherein the Supreme Court of Illinois construed an instrument so similar in form, wording and nature to the Keim-Thomas instrument that it must be considered as a controlling precedent in this case. The circuit court said (T. 382):

> "The deed [in *Manning* v. *Frazier*] did not contain any provision comparable to the abandonment clause in the Keim-Thomas instrument, nor did the court decide any question as to the character of the estate conveyed."

Although the deed construed in *Manning* v. *Frazier*, 96 Ill. 279, was not set forth *verbatim* in the opinion, the Supreme Court of Illinois said, at page 284, that it contained a provision that:

> "the parties of the second part were bound to enter upon and make search for coal, etc., within two years * * *."

This was the protective clause of that deed. It is obvious that the deed in *Manning* v. *Frazier*, 96 Ill. 279, *did* contain a provision "comparable to the abandonment clause in the Keim-Thomas instrument", and did require the grantee to commence operations within a specified time.

And the circuit court of appeals is in error in stating that the Supreme Court of Illinois in *Manning* v. *Frazier,* 96 Ill. 279, did not "decide any question as to the character of the estate conveyed," for the Supreme Court of Illinois said, in its opinion at page 286:

> "* * * the title to the coal undoubtedly vested in the grantee in the deed."

The Supreme Court of Illinois in *McConnell* v. *Pierce,* 210 Ill. 627; *Shell Oil Co., Inc.* v. *Moore,* 382 Ill. 556; *Big Creek Coal Co.* v. *Tanner,* 303 Ill. 297 and the appellate courts of Illinois in *Perry Coal Co.* v. *Richmond,* 287 Ill. App. 298 and *Conover* v. *Parker,* 226 Ill. App. 102, all cite *Manning* v. *Frazier,* 96 Ill. 279, as having construed the instrument involved therein to be a deed of conveyance of the minerals described.

It is important to note that the deed construed in the case of *Manning* v. *Frazier,* 96 Ill. 279, provided for the payment of royalty on each ton of coal mined, and that the Illinois Supreme Court said, page 286:

> "The fair and reasonable construction of the instrument, we think, is that it was a sale and conveyance of the coal in the mine on credit, * * *."

Thus there can be no suggestion that the similar provision for the payment of royalty in the Keim-Thomas deed affected the estate conveyed.

The Circuit Court of Appeals in its opinion completely ignored the decisions of the Illinois Supreme Court which we have herein cited, and arbitrarily based its decision on assumed facts and cases from other jurisdictions. This, we respectfully urge, constitutes a proper occasion for the exercise of the supervisory power of this court.

## II.

**In Reaching Its Decision the Circuit Court of Appeals Departed So Far from the Accepted Course of Judicial Proceedings as to Call for This Court's Power of Supervision.**

The only facts established in this case, apart from the Keim-Thomas deed itself, are those appearing in the Court's opinion at pages 375 and 376 of the Transcript. Absolutely no evidence relating to the intention of Keim or Thomas at the time of the execution of the deed or as to their construction of its effect was offered at the trial. The record on these matters is utterly barren. Moreover, even if such evidence had been offered it would not have been admissable to change the legal effect of the deed. It is a settled rule of law in Illinois that "* * * the nature and extent of the estate granted shall be determined, as a matter of law, from the deed itself. It is not proper to go beyond the four corners of the deed to ascertain the intention of the parties. *Parol evidence may be received to apply the deed to the subject matter, but not to change its legal effect.*" (Italics supplied.) *Rockford Trust Co.* v. *Moon*, 370 Ill. 250, 253; *Powell* v. *Powell*, 335 Ill. 533, 538; *Woods* v. *Seymour*, 350 Ill. 493, 497, 498; *Kozlowski* v. *Mussay*, 395 Ill. 81, 85, 86; *Harder* v. *Matthews*, 309 Ill. 548, 570; *Duffield* v. *Duffield*, 293 Ill. 300, 303.

Despite this rule of construction, despite the rules laid down by the Illinois Supreme Court regarding the legal effect of this instrument and of the last clause thereof, and despite the absolute barrenness of the record, the Circuit Court said (T. 380, 381):

> "It is clear from this *record* that insofar as Thomas' relation with Mrs. Keim was concerned, Thomas construed the instrument as a mere prospective arrangement whereby he had the right to absolve himself from all obligations to her by electing not to go ahead with

placing a mine in operation at Lenzburg before March 20, 1903; that as a result of his election the instrument was rendered void and consequently he was released from all obligations thereunder. Mrs. Keim and her successors in title acquiesced in this construction and not only acted thereon, but changed their position in reliance upon Thomas' interpretation of the instrument as one which he could nullify under the abandonment clause, and both of them treated the instrument as having become void upon Thomas' abandoning in 1903 the shaft he had sunk on the Prediger land. Mrs. Keim never asserted against Thomas any right predicated upon the instrument, and Thomas went his way for over forty years as if the instrument had never been executed * * *.

"In our opinion, when we place ourselves in the place of the parties and read the instrument in the light of the circumstances concerning the parties at the time the instrument was executed, consider the objects they sought to attain and weigh the practical construction which they themselves placed on the instrument * * *." (Italics supplied.)

The Court has here formulated a decision only upon the sheerest imagination, conjecture and supposition. The Court has so arbitrarily ignored the record and the law of Illinois in this case, as to call for the exercise of this Court's supervisory power. Such a process of decision as employed here is not merely of concern to the litigants, but is an exhibition of a ruthless method of decision which if permitted to stand will undoubtedly be repeated in the future, and is thus of utmost importance to future litigants in the Seventh Circuit.

## III.

**The Refusal of the Circuit Court of Appeals to Follow Illinois Law Is In Direct Conflict With Decisions of This Court and Creates In Illinois a Situation Condemned by This Court.**

By completely ignoring the Illinois decisions directly on point and holding that the Keim-Thomas deed created an estate upon condition precedent, the decision of the Circuit Court of Appeals is in direct conflict with the decisions of this Court.

This Court in the case of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, said, at page 78:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law."

From the earliest times the United States Supreme Court and the other federal courts have consistently held that decisions of state courts which settle rules of property will be applied in and be respected by the federal courts. *Olcott* v. *Bynum*, 84 U. S. 44; *Snydam* v. *Williamson*, 65 U. S. 427.

This Court in the case of *Guffey* v. *Smith*, 237 U. S. 101, applied Illinois law to construe rights passing under an oil and gas lease, and said, at page 113:

> "These decisions constitute rules of property and must be accepted and applied in passing upon the complainants' rights."

This Court in *Barber* v. *Pittsburgh, etc. Railway*, 166 U. S. 83, in deciding the question arising upon the filing of an action of ejectment said, at page 97:

> "The real question between the parties, upon which the decision of this case must turn, is what estate Amanda Stephens took under the will of James S. Stevenson * * *."

This Court then went on to say, at page 99:

> "When the construction of certain words in deeds or wills of real estate has become a settled rule of property in a State, that construction is to be followed by the Courts of the United States in determining the title to land within the State, whether between the same or between other parties."

This Court in *Tyler* v. *United States*, 281 U. S. 497, had before it a tax case which involved the character and incidents of tenancy by an entirety, and said, at Page 501:

> "These decisions establish a state rule of property, by which, of course, this Court is bound."

If the Circuit Court's decision is allowed to stand, it is incontrovertible that a rule for the construction of deeds creating conditional estates in Illinois will exist in the federal courts separate and apart from the Illinois law. Thus, the exact situation denounced by this Court with regard to the application of general law in *Erie Railroad* v. *Tompkins*, 304 U. S. 64, will have been created with respect to an important phase of local law. Future rights will be adjusted on the happy or unhappy chance of adjudication before one court or another. Any person purchasing land, by not knowing who his adversary might ultimately be, will not know his rights in relation to such land. Equal protection of the law will be impossible and uniformity in the administration of the law of the State of Illinois will be prevented.

The trial court, in taking cognizance of the Illinois authority submitted, said (T. 313):

> "It is not to be presumed that the courts in Illinois, whatever may be the law in other jurisdictions, would

apply in this case an innovation that would destroy or endanger another long-established rule of property."

Countless titles in Illinois are based upon protective clauses similar to that in the Keim-Thomas deed. The question thus presented is of vital importance to property owners in Illinois and we urge that a proper occasion has arisen for the exercise of the supervisory power of this Court.

## IV.

**The Decision of the Circuit Court of Appeals to Remand the Case for Further Proceedings In Conformity With Its Opinion Is In Direct Conflict With the Decisions of This Court.**

The Circuit Court was faced with the interpretation of an instrument of conveyance under Illinois law. No constitutional or other federal question was involved. Petitioner and respondent were in the federal court solely by virtue of diversity. Respondent filed this case in the federal court sitting in East St. Louis, Illinois, which is in the county where the land involved is located. The availability of the state tribunal is obvious. For a reason known only to respondent it chose the federal court. *Although it does not appear in the record, a case involving substantially identical issues, and affecting title to the land here in question, to which both petitioner and respondent have been made parties, and in which respondent has appeared, is now pending in the state court.*

In its opinion the Circuit Court stated (T. 378):

> "the precise question * * * has never been passed upon by the Illinois courts."

It then proceeded to decide an important question of local real estate law. By doing so it failed to concern itself

"with the much larger issue as to the appropriate relationship between federal and state authorities functioning as a harmonious whole" (*Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, 172, 173). It made a forecast and prediction as to what the Illinois courts would ultimately hold, realizing that by making a tentative answer in a field in which the state is supreme its decision might "be displaced tomorrow by a state adjudication" (*Railroad Commission of Texas* v. *Pullman Company*, 312 U. S. 496, 500).

The Circuit Court's decision on the issue of title, after finding that no state decision had been found, is in direct conflict with the decision of this Court in *Thompson* v. *Magnolia Petroleum*, 309 U. S. 478. In that case this Court said (p. 483, 484):

> "Decision with which the Federal court of bankruptcy is here faced calls for interpretation of instruments of conveyance in accordance with Illinois law. Neither statutes nor decisions of Illinois have been pointed to which are clearly applicable. And the difficulties of determining just what should be the decision under the law of that State are persuasively indicated by the different results reached by the two Circuit Courts of Appeal that have attempted the determination. Unless the matter is referred to the State courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have—by the accident of Federal jurisdiction—been determined contrary to the law of the State which in such matters is supreme."

Moreover, the Circuit Court's decision is in direct conflict with the decisions of this Court in *Railroad Commission of Texas* v. *Pullman Company*, 312 U. S. 496, and *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, in which cases this Court, recognizing the desirability of having state determinations upon doubtful questions of state law, ordered that the question be remitted for submission to the

state courts as the more appropriate forum for decision. (See 54 Harvard Law Review 1379.)

## Conclusion.

The decision of the Circuit Court of Appeals for the Seventh Circuit is manifestly erroneous. The question presented is of paramount importance in Illinois real estate law. The decision is in direct conflict with the decisions of the Supreme Court of Illinois. A settled rule of construction upon which countless titles are based has been set aside in the federal court and an arbitrary and conflicting rule established. A situation condemned by this Court respecting the application of local law has been created. It is, therefore, respectfully urged that this petition for writ of certiorari be granted.

Respectfully submitted,

David F. Root,
Leonard Hoffman,
*Attorneys for Petitioner.*

FILE COPY

Office - Supreme Court, U.
FILED
MAR 26 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

**No. 589**

NORTHERN ILLINOIS COAL CORPORATION,
*Petitioner,*

*vs.*

MIDWEST-RADIANT CORPORATION,
*Respondent.*

## OPPOSING BRIEF OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI.

HENRY DRIEMEYER,
CHARLES F. GRIMES,
FREDERICK E. MERRILLS,
ISAAC C. ORR,
*Attorneys for Respondent.*

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

## SUBJECT INDEX.


PAGE

Correction of Petitioner's Summary of the Case..... 1-4

Summary of Argument..... 4

Argument ..... 5


### Table of Cases.


Adams v. Gordon (1914), 265 Ill. 87, 91..... 8

Edward Hines Yellow Pine Trustees v. Martin (1924), 268 U. S. 458, 465..... 14

Francis v. Southern Pacific Co. (1948), 333 U. S. 445.. 12

Goodwillie Co. v. Commonwealth Electric Co. (1909), 241 Ill. 42, 73..... 8, 9

Helvering v. Stuart (1942), 317 U. S. 154, 164, 165.... 12

Henry v. Metz (1942), 382 Ill. 297, 300, 306..... 7

Hollenbeck v. Hollenbeck (1908), 232 Ill. 384..... 9

Kinder v. LaSalle County Coal Co. (1923), 310 Ill. 126, 134 ..... 7

Law v. Kane (1943), 384 Ill. 591, 596..... 9

Magnolia Petroleum Co. v. West (1940), 374 Ill. 516, 520 ..... 8, 9

Maguire v. City of Macomb (1920), 293 Ill. 441, 448... 7

Manning v. Frazier (1880), 96 Ill. 279.....10, 11

Meredith v. Winter Haven (1943), 320 U. S. 228, 237..13, 14

Nowak v. Dombrowski (1915), 267 Ill. 103, 107.....6, 11

Palmer v. Hoffman (1943), 318 U. S. 109, 118..... 12

Plummer v. Worthington (1926), 321 Ill. 450..... 11

Sanitary District v. Chicago Title & Trust Co. (1917), 278 Ill. 529..... 11

Shadden v. Zimmerlee (1948), 401 Ill. 118..... 8
Sherman v. Town of Jefferson (1916), 274 Ill. 294..... 11
Spiegel v. Commissioner of Federal Revenue No. 3, October Term, 1948, decided January 17, 1949, 17 L. W. 4135..... 12
Storey v. Storey (1888), 125 Ill. 608, 613..... 9
Texas Company v. O'Meara (1941), 377 Ill. 144, 151... 8
Walker v. I. C. R. R. Co. (1905), 215 Ill. 610, 618, 619.. 7, 8

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

---

**No. 589.**

---

NORTHERN ILLINOIS COAL CORPORATION,
*Petitioner,*

*vs.*

MIDWEST-RADIANT CORPORATION,
*Respondent.*

---

## OPPOSING BRIEF OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI.

---

Petitioner's "Summary Statement of the Matter Involved" is incomplete and misleading. Respondent therefore supplies the following statement of facts. *These* were the facts upon which the Court of Appeals relied in its construction of the Keim-Thomas instrument, as will be noticed in reading the opinion found in 171 Fed. 2nd 635 and in the transcript at page 374.

## STATEMENT OF THE CASE.

On March 20, 1902, and prior thereto, Augusta Keim, a widow, owned in fee simple and was in possession of an eighty-acre farm situated near Lenzburg, in St. Clair County, Illinois. On that day she executed the instrument involved in this case (Pltf's. Exhs. 3 and 18, Trans. 18, 250, 67).

Thomas, named as the "grantee" in the Keim instrument, then and ever since has resided in Missouri. He was a promoter and engaged in putting together a block of land in the vicinity of Lenzburg, Illinois, with the purpose of prospecting for coal, and with the hope of obtaining the financial support necessary to develop and operate a mine if coal in satisfactory quantity and quality was found. When the Keim instrument was executed he had not determined where his prospecting operations would begin. Thomas never paid Augusta Keim any money for this instrument except, perhaps, the $1.00 recited therein (Pltf's. Exhs. 6, 7 and 11, Trans. 153-157, 171, 301, 307). Seven weeks later he obtained from William Prediger a bond for deed for a ten-acre tract of land one-fourth mile west of the Village of Lenzburg, and a half mile distant from the Keim farm, the condition of which was that Thomas was to sink a coal shaft thereon (Trans. 171). Some time thereafter Thomas did commence sinking a shaft on the Prediger land; he spent approximately $3,000 of his own funds in so doing, and local citizens contributed additional money, material and services used in sinking the shaft (Trans. 301). Thomas did not place said shaft in operation as a mine; he abondoned the shaft on the Prediger land in the latter part of 1902 or early in 1903; he did not begin or sink any other mine at Lenzburg or in

the vicinity thereof (Trans. 171, 301, 307). After Thomas' mining enterprise collapsed, the record contains no intimation of Thomas ever being seen in the vicinity of Lenzburg again.

Thomas never sunk a mine upon the Keim land or mined or removed any coal therefrom, or entered upon or took actual possession of the coal thereunder, or made any payment of royalty to Augusta Keim, or anyone claiming under her (Trans. 80, 81, 302). He never paid any taxes on the coal under the Keim land (Trans. 70).

Augusta Keim continued in possession of her farm until July 16, 1909, when she conveyed it by warranty deed to Ernest W. Hentze, predecessor in title of the defendant John W. Hentze (Trans. 80). This deed contained no reservation or exception of the coal or any mineral estate, but warranted the title to the entire fee (Trans. 133). Ernest W. Hentze took possession of the farm, and this farm since that time has at all times been in the exclusive possession of members of the Hentze family (Trans. 83, 84).

On October 5, 1944, the Hentzes, as lessors, entered into an agreement with respondent, as lessee, whereby in consideration of the payment by respondent of earned royalties of 8 cents per ton of coal mined, and advance royalty payments of $2,400 in cash per year for ten years or until the coal was actually mined therefrom, the Hentzes leased their farm to respondent for a term of thirty years for the purpose of mining coal. This lease was recorded on October 14, 1944 (Pltf's. Exh. 5, Trans. 146, 308). Immediately thereafter, on November 27, 1944, Northern Illinois Coal Corporation, for a recited consideration of $10.00, procured from Thomas a quitclaim of the interest which he had acquired by the Keim instrument, and whatever tagends remained of his 1902 promotion (Trans. 155). This quitclaim was recorded on November 30, 1944; it affords,

alone, the basis for the tenuous claim of ownership of the coal asserted by Northern Illinois Coal Corporation, which has not attempted to take possession of, mine or remove the coal under the Hentze farm (Pltf's. Exh. 7, Trans. 155, 315).

## SUMMARY OF ARGUMENT.

### I.

The Decision of the Court of Appeals Does Not Involve Important Questions of General Illinois Real Estate Law. The Court Merely Applied Settled Rules of Construction to Determine the Intention of the Parties to a Particular Instrument and, Consequently, Its Legal Effect.

### II.

The Court Should Follow Its General Policy of Leaving Undisturbed a Holding by the Court of Appeals On a Question of State Law Where Plain Error Does Not Appear.

### III.

Even if a Difficult Problem of Local Law Had Been Involved in This Case, It Was Not One Which Should Have Been Remitted to the State Courts for Decision.

## ARGUMENT.

### I.

**The Decision of the Court of Appeals Does Not Involve Important Questions of General Illinois Real Estate Law. The Court Merely Applied Settled Rules of Construction to Determine the Intention of the Parties to a Particular Instrument, and, Consequently, Its Legal Effect.**

Petitioner repeatedly admits in its petition and brief that the only problem which the Court of Appeals had was the construction of the Keim-Thomas instrument of 1902 (pp. 6, 11, 21, 31).

Petitioner contends, however, with total inconsistency, that because the Keim-Thomas instrument was to be void unless certain events occurred, the instrument was, under Illinois law, a deed upon condition subsequent, and that the Court was, therefore, powerless to do anything but declare it such, no matter how clear the intention of the parties to the contrary may have been. In developing its argument on this contention petitioner says that the Keim-Thomas instrument is "a typical mining conveyance under the Illinois law," that the provision therein that

> "grantee to commence sinking a mine at Lenzburg in six months from this date and have same in *opperation* in one year from this date or this deed is to be void"

is a "protective clause * * * habitually inserted in mineral conveyances in Illinois" * * * "for the protection of the grantor," and that this type of "protective clause" has been so consistently held by the Illinois Courts to create an estate upon condition subsequent as to establish an Illinois rule of property by which the Court is bound.

Obviously under this contention of petitioner there would be no problem of construction, but merely a process of classification.

Illinois decisions do not disclose that there is *any typical form* of mining conveyance. Practically, the form of the instrument used to express the grant of a conditional mineral estate varies with the varying bargain of the contracting parties; the instrument is fashioned to fit the agreement made and to express the intention of the parties. Nor is a so-called "protective clause" in the form found in the Keim-Thomas instrument *habitually* inserted in instruments granting mineral estates in Illinois; *it is not found in any case upon which petitioner relies.* There are no words or phrases in this instrument having such definite legal significance as to exclude construction for the purpose of determining the intention of the parties.

The problem of determining the legal effect of the Keim-Thomas instrument is not, therefore, one of classification; the problem is one of construction and the rules of construction to be applied are those which are entirely familiar to Illinois lawyers and judges.

1. Under Illinois law, the fact that certain words or phrases may have been held, in some cases, to create a condition subsequent, does not mean that the same words or phrases appearing in another instrument must necessarily also create a condition subsequent. In the latter case the circumstances surrounding the parties, the objects which they were seeking to attain, and their own practical construction may be different and indicative of an intention to create a condition precedent rather than a condition subsequent. If so, such intention and not mere isolated phrases will prevail. In *Nowak* v. *Dombrowski*, 267 Ill. 103, 107, the court said:

> "* * * No technical or precise words are used to distinguish a condition precedent from a condition sub-

> sequent. The same words may create either, according to the rules of construction and the intent of the parties to the instrument. * * * In all cases it is a question of intention and not of phrase or form. * * * The intent, when apparent and not repugnant to any rule of law, will control technical terms, for the intent, and not the words, is the essence of every agreement."

To the same effect, see:

*Maguire* v. *City of Macomb,* 293 Ill. 441, 448.

2. In striving to ascertain the intention of the parties, the instrument will be viewed as a whole and particular words will never be "isolatedly considered." As was said in *Walker* v. *I. C. R. R. Co.,* 215 Ill. 610, 618:

> "* * * it is not permissible to select a few words from the instrument and base a construction thereof upon a consideration of those words alone, but the entire instrument should be considered. An elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties and the intention which they have manifested in forming them."

Where the question is one of construction of a deed or other instrument, the Illinois view is that each case must rest on its own particular facts and circumstances. *Kinder* v. *La Salle County Coal Co.,* 310 Ill. 126, 134.

3. The Illinois approach in the construction of deeds and other instruments is broad and liberal. The prime objective is to ascertain what the parties really and actually intended, and then to give effect to that intention unless to do so would violate some rule of law or public policy. Technical matters of form yield to substance. Thus in *Henry* v. *Metz,* 382 Ill. 297, 300, the Illinois Supreme Court characterizes the general Illinois approach as follows:

> "In ascertaining and giving effect to the intent of the parties to a deed, the courts are not confined to a strict and literal construction of the language used, when to do so would frustrate the intent of the parties."

And in *Magnolia Petroleum Co.* v. *West*, 374 Ill. 516, 520, the Court said:

> "* * * The words need not be construed literally or strictly, since greater regard is accorded to the real intention as manifested in the entire deed than to any particular word or arrangement in its expression."

This broad and liberal approach in the construction of deeds and other instruments has been reaffirmed in the most recent expressions of the Illinois Supreme Court. *Shadden* v. *Zimmerlee*, 401 Ill. 118.

4. In seeking the intention of the parties, the Court will place itself as nearly as possible back in their situation at the time the instrument was entered into, consider surrounding circumstances, the subject matter involved, and the objects which they had in mind. *Goodwillie Co.* v. *Commonwealth Electric Co.*, 241 Ill. 42; *Adams* v. *Gordon*, 265 Ill. 87, 91; *Texas Company* v. *O'Meara*, 377 Ill. 144, 151.

5. In construing doubtful terms or provisions of deeds or other written instruments, the Illinois courts accord decisive weight to the practical construction of the parties themselves. In *Walker* v. *I. C. R. R. Co.*, 215 Ill. 610, 619, the Court said:

> "* * * It is allowable always to look to the interpretation the contracting parties place on their agreement, either contemporaneously or in its performance, for assistance in ascertaining its true meaning. No extrinsic aid can be more valuable. (*Vermont Street M. E. Church* v. *Brose*, 104 Ill. 206.) A reasonable construction placed upon an indefinite or uncertain contract by the conduct of the parties will be adopted by the courts. *Work* v. *Welsh*, 160 Ill. 468."

and in *Law* v. *Kane,* 384 Ill. 591, 596, the Court said:

> "* * * Where the deed contains ambiguous language, a reasonable interpretation by the parties, themselves, found in their contemporaneous or subsequent acts and declarations, will generally be adopted. (*Williams* v. *Swango,* 365 Ill. 549.)"

See also *Hollenbeck* v. *Hollenbeck,* 232 Ill. 384; *Magnolia Petroleum Co.* v. *West,* 374 Ill. 516; *Storey* v. *Storey,* 125 Ill. 608, 613. The practical construction placed on an instrument by a party thereto is binding on one claiming as his successor in title. *Goodwillie Co.* v. *Commonwealth Co.,* 241 Ill. 42, 73.

The decision of the Court of Appeals did not, therefore, enunciate a new rule of general Illinois real estate law. The Court merely applied settled local rules of construction to determine the intention of the parties to the particular instrument before it, and, consequently the legal effect of that instrument.

The whole tenor of petitioner's contention is, as it was in the Court of Appeals, directed toward shutting out any real inquiry into what the parties actually intended. The rules in Illinois with respect to this question required such inquiry.

When Thomas abandoned his mining venture at Lenzburg in 1903, he went back to Missouri and never returned. He remained completely indifferent to everything that occurred thereafter. He paid no royalties. He paid no taxes. He did not, for 40 years, assert the existence of any property right. Mrs. Keim and her grantees dealt with the property as if Thomas had no interest in it of any character.

The Court of Appeals was justified in giving the effect it did to the practical construction placed upon the instrument by the parties, and in concluding, as it did, that (171 F. 2d, at page 640):

> "It is clear from this record that insofar as Thomas' relation with Mrs. Keim was concerned, Thomas construed the instrument as a mere prospective arrangement whereby he had the right to absolve himself from all obligations to her by electing not to go ahead with placing a mine in operation at Lenzburg before March 20, 1903; that as a result of his election the instrument was rendered void and consequently he was released from all obligations thereunder. Mrs. Keim and her successors in title acquiesced in this construction and not only acted thereon, but changed their position in reliance upon Thomas' interpretation of the instrument as one which he could nullify under the abandonment clause, and both of them treated the instrument as having become void upon Thomas' abandoning in 1903 the shaft he had sunk on the Prediger land. Mrs. Keim never asserted against Thomas any right predicated upon the instrument, and Thomas went his way for over forty years as if the instrument had never been executed."

None of the cases relied upon by petitioner suggests the proper construction of the instrument in question, or affords valid basis for contention that the Court of Appeals erred in its method of application of settled Illinois rules of construction.

The provision in *Manning* v. *Frazier*, 96 Ill. 279, upon which petitioner leans so heavily, and which petitioner calls "the protective clause of that deed," was not a condition but a covenant upon the part of the grantee which bound him unconditionally to mine the coal conveyed, and specifically limited his right to abandon mining operations to the time when the coal should be exhausted. There was no question in that case of a conveyance upon condition subsequent or precedent; the only question decided was that a vendor's lien attached to unmined coal conveyed to the grantee for the purchase price of coal that had been mined.

There is nothing in the *Manning* case which even sug-

gests how the present case should be decided. In the *Manning* case a present estate in fee was necessary to enable the grantee to perform his agreement to mine the coal. In the instant case Thomas was not bound under his agreement with Mrs. Keim to mine any coal at any time. Neither Mrs. Keim nor Thomas intended that Thomas should have any estate in the coal under her land unless he became entitled to it by performance of the condition.

*Manning* v. *Frazier* is the only case relied upon by petitioner which involved a mineral or sub-surface estate. The condition expressed in the instruments construed in *Sherman* v. *Town of Jefferson,* 274 Ill. 294, *Plummer* v. *Worthington,* 321 Ill. 450, and *Sanitary District* v. *Chicago Title and Trust Co.,* 278 Ill. 529, which petitioner refers to as "protective clauses" were each properly construed by the Court as conditions subsequent; this was required to give effect to the plain intention of the parties. The grant of a present estate was necessary to effectuate the purpose of the conveyance. But the fact that the conditions in the deeds construed in those cases were held to be subsequent does not argue that it is the law in Illinois that every instrument which provides that it is to be void in the event of the non-performance of a provision therein is a deed upon condition subsequent. On the contrary the rule is as clearly stated in *Nowak* v. *Dombrowski,* 267 Ill. 103, 107, quoted above at pages 6 and 7 of this brief.

## II.

### The Court Should Follow Its General Policy of Leaving Undisturbed a Holding On a Question of State Law Where Plain Error Does Not Appear.

This Court has frequently stated that unless plain error appears in the decision of a Court of Appeals on a question of local law, the lower court's decision will not be dis-

turbed. *Francis* v. *Southern Pacific Co.*, 333 U. S. 445; *Helvering* v. *Stuart*, 317 U. S. 154, 164, 165; *Palmer* v. *Hoffman*, 318 U. S. 109, 118. No plain error appears in the decision of the Court of Appeals in this case. Two of the three judges who composed the Court have long been residents and lawyers of Illinois. The opinion of the Court of Appeals was written by a judge who was for many years an Illinois circuit judge and a justice of the Illinois Appellate Court, and then was Attorney General of Illinois. Another justice of the Court of Appeals was also formerly an Illinois circuit judge.

This Court's language in *Spiegel* v. *Commissioner of Federal Revenue*, No. 3, October Term, 1948, decided January 17, 1949, 17 L. W. 4137, is particularly appropriate:

> "The record reveals that the state law problem here is not an easy one, but under this Court's decision in *Meredith* v. *Winter Haven*, 320 U. S. 228, the difficulty involved did not relieve the Court of Appeals of its duty to make a decision. The questioned ruling was made by three judges who are constantly required to pass upon Illinois law questions. One of the three judges has long been a resident and lawyer of Illinois. Examination of the Illinois state court opinions pressed upon us leaves us unable to say with any degree of certainty that the Court of Appeals holding was wrong. * * * It is sufficient for us to say that we think reasonable argument can be made based on Illinois cases to support a determination of this question either for or against the petitioner's contention. Under these circumstances we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of state law."

Illinois cases in abundance clearly support the decision of the Court of Appeals. Therefore, this Court, following its general policy, should not disturb that decision.

## III.

**Even If an Unsettled Problem of Local Law Had Been Involved in This Case, It Was Not One That Should Have Been Remitted to State Courts for Decision.**

Petitioner steadfastly sought a federal court determination of this case in its favor through 3½ years of costly and protracted litigation. Petitioner adheres to that objective throughout most of its brief in this Court. Then suddenly petitioner suggests that the case should be remitted to the state courts, claiming the legal question involved is one of first impression in Illinois and should, therefore, petitioner claims, be decided initially by an Illinois court. Perhaps this contradictory approach is of itself sufficient to require denial of the petition.

Federal courts do not decline (as petitioner urges) to decide an unsettled question of local state law. Rather, as this Court said in *Meredith* v. *Winter Haven*, 320 U. S. 228, 237, which involved a matter of unsettled Florida law:

> "*Erie R. Co.* v. *Tompkins, supra,* did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern. Accepting this responsibility, as was its duty, this Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state has not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain."

All cases cited by petitioner on this point are merely exceptions to the above mentioned rule and each case which petitioner cites is discussed as an exception in the *Winter*

*Haven* case. These exceptions involve a refusal of federal courts to pass upon, for example, state statutes or orders of state administrative bodies, or to shape policy of state administrative agencies, until after a state court acts thereon. None of the exceptions mentioned in the *Winter Haven* case exists in the instant case.

Petitioner suggests on page 21 of its petition that some proceeding is pending in a state court affecting the real estate here involved. No such point was presented in the District Court or in the Court of Appeals and petitioner concedes that its statement is wholly unsupported by the record before this Court. As was said by Mr. Justice Stone, speaking for this court, in *Edward Hines Yellow Pine Trustees* v. *Martin* (1924), 268 U. S. 458, 465:

> "* * * This Court is a court of review and it will not consider questions not raised or disclosed by the record brought to it for a review and which were not considered by the courts below."

## Conclusion.

For the reason stated, respondent respectfully asks that the petition for Writ of Certiorari be denied.

Respectfully submitted,

HENRY DRIEMEYER,
CHARLES F. GRIMES,
FREDERICK E. MERRILLS,
ISAAC C. ORR,
*Attorneys for Respondent.*